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FEDERAL INDETERMINATE SENTENCE¹

Van Buren Perry²

A Resolution opposing the enactment of either H.R. 4581 or S 1638, now pending in Congress, was unanimously adopted on August 20, 1941 by the Association of the Circuit Judges of the State of South Dakota, and a memorandum stating the reasons for such opposition has been filed with the House and Senate Judiciary Committees.

The pending bills are similar in effect; each provides that in criminal cases where a Federal Judge desires or is required to pronounce a sentence of more than a year and a day, the Judge shall be deprived of the power to pronounce a definite sentence but must impose an indeterminate sentence, the definite term of which shall thereafter be determined by a Board of Indeterminate Sentence and Paroles. Both bills provide that the functions of this Indeterminate Sentence Board shall be combined with the existing Board of Paroles. In the House Bill the combined board is to be composed of five members, to be appointed by the President and confirmed by the Senate. In the Senate Bill, the board is to consist of seven members to be appointed by the Attorney General.

The objections advanced by the South Dakota Judges are as follows:

Memorandum

As Trial Judges of the State Courts we are concerned lest the Federal Government, by enacting either of these resolutions, set an unwise precedent which would inevitably be urged for adoption by the states.

As jurists we are concerned lest an unsound system of penology be established in the nation.

As both jurists and as American citizens we are concerned lest the constitutional structure of the Federal Government be impaired. We believe:

A. That the sentencing power is a judicial power which cannot be taken from the judicial department or transferred to the executive department without violating both the letter and the spirit of the Constitution.

B. That, assuming that either of the proposed Acts is within the power of Congress, which we do not agree to, enactment of either would nevertheless be unwise because:

1. The adoption of the principle involved would be unwise as a matter of national policy. It would be as-

¹ At the recent meeting of the Criminal Law Section of the A. B. A. in Indianapolis, it was agreed to make this the major subject for discussion in the same section next year. A symposium and panel discussion is being arranged by the Chairman of the Section, J. J. Robinson.

The Editors of this *Journal* will welcome brief contributions on all sides of the question.

² Judges Van Buren Perry (Chairman), W. W. Knight and John T. Medin of the Circuit Court of South Dakota compose the Committee of the Association of Circuit Judges referred to in the opening paragraph. Judge Perry is a member, also, of the Committee on Sentencing, Probation, Prisons and Parole of the Section on Criminal Law of the American Bar Association.

sumed by many people that the executive department is seeking a further aggrandizement of its powers at the expense of the judicial department, whereby the executive department might prescribe the penalties for violations of labor laws, anti-trust laws, regulations affecting commerce and industry and other acts of an economic or social nature, in addition to the common crimes. It would be unwise to vest such powers in the executive department. The very advocacy thereof at this time is likely to precipitate a controversy as bitter as that which marked the so-called attempt to "pack" the Supreme Court, and at a time when the people should be united behind the administration on matters of national defense such a controversy should be avoided.

2. Such an Act would tend further to centralize governmental power, hence is undemocratic in spirit and in effect it tends toward totalitarianism. It would augment an over-developed bureaucracy. Centralization of power is always dangerous and would be especially so here because in order to affect any particular sentence or type of sentence it would only be necessary to intimidate, bribe, entice, or corrupt by political influence or otherwise not to exceed three or four persons. These few could determine the nation wide pattern or trend favoring or greatly punishing persons who violate a particular type of law. For example, such a board could establish light sentences for laborers violating a labor act, or

ruinous sentences for employers. We doubt if any three or four men would or could be politically appointed who could resist the pressures that might be brought to influence such a board. The Federal judiciary, as a whole, fortified by tradition and training, and possessing an absolute independence, is practically free from even the suspicion of corruption or improper influence. We know of no way by which the Government could find the number of real experts required to dispatch the work better than the Judges do.

3. The proposed sentencing board would expand beyond all present imagination. It would not only be obliged to consider all applications for parole, of which there were 9,625 acted upon during the last fiscal year, and which now consumes or should consume all its time,³ but also to determine sentences in approximately 10,082 cases per year in which prison sentences of more than one year are imposed. (The quoted figure is for the last fiscal year). It would dispose of about 20,000 cases of parole or sentence per year—one every five minutes. What a force would be required! It would necessarily function, as the Act provides, through politically appointed examiners who would be practically anonymous and not required either to work openly in the public gaze, or to assign reasons, or to be responsible to an elective officer of the people. Experience with the use of examiners in other fields has not been entirely satisfactory and has not led the public to

³ The staff of the Federal Board of Paroles is now composed of 3 Board Members, 2 Examiners, 5 Reporters, 1 Parole Executive and 9 Clerks. It

has part time service of an Assistant Attorney General.

have complete confidence in either their expertness or impartiality. In large degree the sentencing power would be transferred from the courts—not to the board but to the examiners.

4. The proposals do not limit the extent of the inquiry by the examiner, nor provide what kind of evidence he may consider. In the absence of any representation from the Prosecuting Attorney, the examiner may virtually re-try the case in star chamber, on hearsay testimony or mere opinion, without any of the safeguards now enjoyed by either the people or the defendant, and the report of the examiner will be conclusive in nearly all cases. The examiner will be exposed to all manner of corrupting influences, sympathy, intimidation, bribery, perjury and inadequate presentation of facts.

5. The proposed board is to be appointed for short terms by the Attorney General, and in S. 1638 the Attorney General may remove any member for any "inefficiency, neglect of duty or malfeasance in office." Thus reappointment is made dependent upon satisfying the prosecuting arm of the government and deprives the board of that independence which distinguishes the federal judiciary who are appointed for life, by the President, and who are confirmed by the Senate, and who are removable only for good cause established before a responsible body.

6. No politically appointed board could enjoy the confidence and esteem in which the mass of the people now hold the Federal judiciary. Juries would be more reluctant to convict in criminal cases where they have no con-

ception of the consequences to the defendant which might follow, especially where such juries have no especial reason for confidence in the action by the sentencing board. It would require generations to create such confidence.

7. The treatment of cases by a sentencing board tends to become routine and to follow a pattern. We believe this to be true in the present method of handling paroles. There is no assurance that those who will be appointed to the board will be truly expert in the matter of sentencing, and there is grave danger that appointments would be largely influenced by political considerations.

8. The individualized treatment of prisoners which is essential to justice would in time be destroyed. To a large degree punishment must be fitted to the offender, not the offense, and justice requires an appraisal of causes, motives, penitence, strength of character, and reformability in every case. These are seen and considered by the sentencing judge, but under H. R. 4581 a majority of the sentencing board would never see the prisoner at all, and under S. 1638 no board member is required to see the prisoner. No board disposing of about 20,000 cases a year could or would exercise such care and judgment as is usually shown by the Federal judiciary in pronouncing sentences. It would discriminate against the poor, for only the rich could employ counsel able to get a hearing before the board.

9. The measure is unnecessary. There is no widespread or substantial dissatisfaction with the sentences now

pronounced by Federal judges in criminal cases, when the whole record is considered. If there are occasional departures from what seem to be sound judgment, the sentencing board is equally subject to such errors.

10. Indeterminate sentences have been authorized or required in a number of states, but after careful investigation we are led to believe that indeterminate sentencing boards have not been particularly successful anywhere and have been most unsatisfactory in most states.

11. The need for a change in sentencing methods, to the extent that there is need, is evidenced only by cases which are exceptional, and while some improvement may be possible, we do not think that the proposed Act is the correct remedy.

12. Lastly, it must always be remembered that plausible theories rarely work as well in actual practice as the proponents claim and hope; and in the present measure there are many grave dangers which the proponents have ignored. Of all the divisions of government, none is so respected and trusted and none is less criticized than the Judicial branch. It is the most jealously prized, and it should be left alone.

*Proposed Substitutions or
Amendments*

The Chairman of the Committee has proposed the following substitutions for the pending bills, or amendments to them, designed to remove the majority of the objections stated in the foregoing memorandum:

1. Empower the District Court, in its discretion, to pronounce in any case an indeterminate sentence within the statutory limits of punishment; and thereafter, within one year from date of plea or verdict, to make such sentence definite as to length of time, by means of a supplemental order.

Create within the Board of Paroles a subdivision composed of such psychiatrists, psychologists, penologists or other experts as the Attorney General may designate, whose duty it shall be, when so requested by a District Court or the Attorney General, to make a pre-sentence investigation as to the character of the defendant, including his past offenses, and a recommendation for definite sentence. Such investigation should not be a hearing or trial, and should be made under such rules as the Attorney General may prescribe. The report and recommendation should be furnished the Trial Court within six months after request, and in any event within one year from plea or verdict. The trial court can then determine sentence after considering the recommendation of the experts.

2. Create the board of experts as above suggested. Require it to make investigation and report, with recommendations, in all cases where sentence of more than one year and a day has been pronounced. Provide that the Trial Court, having pronounced a definite sentence of more than one year and a day, at any time within such year may revise such sentence after considering the recommendations of the experts.